IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

JUDGMENT

Kaloo & Ors. vs. The State of Rajasthan.
1. D.B.Cri. Appeal No.97/1986

Gaharu & Anr. vs. The State of Rajasthan.
2.D.B.Cri.Appeal No.73/1986

Kalu Ram & Ors. vs. The State of Rajasthan.
3.D.B.Cri. Jail Appeal No.94/1986

Under Section 374 (2) Cr.P.C. against the judgment dated 12.02.1986 passed by the Additional Sessions Judge, Chittorgarh, in Sessions Case No.05/85.

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Date of Judgment: 04th October, 2007.

PRESENT

HON'BLE MR.JUSTICE BHAGWATI PRASAD
HON'BLE MR.JUSTICE MUNISHWAR NATH BHANDARI

Mr.T.S.Champawat for the appellants.
Mr.JPS.Choudhary, Public Prosecutor.

BY THE COURT :(PER HON.MR.BHAGWATI PRASAD,J.)-

The present three appeals are filed by the accused

appellants against the conviction and sentence as recorded by the learned Addl. Sessions Judge, Chittorgarh in Sessions Case No. 5/85 dated 12.02.86. Out of the present appellants one of the appellants namely Kaloo has died. One appeal is jail appeal, another appeal is by two accused appellants and the other accused persons are appellants in appeal No.97/1986.

The prosecution was initiated on the basis of a written report as lodged by the first informant at police station Kapasan alleging interalia that on 03.02.83, at about 05.00 AM, complainant was going to sell milk. The accused were sitting in front of his house. When he got out from his house he was assaulted and thereafter Bheru Lal was brought out and given beating.

The dispute was in relation to a lady Pyari, who came as a 'natayat' to deceased Bheru. The deceased Bheru already had a wife, Kesar, who is one of the prosecution witness examined by the prosecution as PW/18. Admittedly, Kesar is the living spouse of deceased Bheru and accused Bheru his her wedded husband. The case of the prosecution is that accused Bheru used to mal-treat Pyari therefore, she had contacted nata with deceased Bheru. From the prosecution evidence this is more than clear that the dispute

related to harbouring the wife of accused Bheru by deceased Bheru. According to the record, as it is given on record, there is a tradition in the family of accused and the deceased that a customary divorce by paying some amount of money to the aggrieved party the lady can be relieved from one family to be accommodated in other family, it is alleged. That had happened in relation to Pyari. As the prosecution story goes, the accused had taken away Pyari during the assault and later she was rescued by the police.

The case was investigated and charge sheet was filed. After filing of the charge- sheet, case was made over to the trial court. The trial court framed charges u/s 147, 325, 325/149, 323, 323/149, 302, 302/149, 452, 366 IPC against the accused persons which were denied by the accused persons . At the trial prosecution examined 23 witnesses and exhibited 51 documents . The defence exhibited 7 documents. After the trial , the trial court convicted the accused appellants as under :-

Under section 147, 323/149, 325/149, 302/149, 452, 366 IPC. (Accused Bheru has also been convicted under section 368 IPC).

U/s 147 IPC – 6 months' R.I.

U/s 323 /149 IPC 1 month's R.I.

U/s 325/149 IPC, 6 months' R.I. And a fine of Rs.100/- each in default 1 month's R.I.

U/s 302/149 IPC life imprisonment and a fine of Rs.200/- each, in default 2 months' S.I.

U/s 452 IPC 1 year's R.I. and a fine of Rs.100/-, in default 1 month's S.I.

U/s 366, 3 years' R.I. And a ine of Rs.100/-, in default 1 month's S.I. and accused appellant Bheru has been sentenced for offence u/s 368 for 3 years' R.I. and a fine of Rs.100/-, in default 1 month's S.I.

The learned counsel for the appellants urged that first Gottu came out of the house and he was assaulted and, thereafter Bheru was pulled out, is the story given in the first information report. However, Kesar, PW/18 , wedded wife and the surviving spouse of the deceased has admitted that her husband Bheru had also got Pyari in his fold. She had stated that Gottu was assaulted after Bheru died. She had made Gottu to sleep in the house. Thus, the very case of the prosecution as has been put forward in the prosecution documents and the statement of the witnesses ,do not confirm to the version of witness PW/18 Kesar. In this background, where the story of the prosecution, as given out in the statement of witnesses, and the

prosecution documents, is subject to reasonable doubt then it becomes more than obvious that the prosecution has not given the correct version. If on the showing of the prosecution witness the origin of fight is subject to dispute, the prosecution case becomes dialuted. The origin of the manner of occurrence appears doubtful. Thus, the whole prosecution case has to be considered to be doubtful and benefit of doubt should go to the accused.

This is admitted case that spouse of accused Bheru has started living with deceased Bheru, without there being a legal divorce. May be that customary divorce took place and in this background , the prosecution case gets severe jolt because when there is a surviving spouse and there are illegal legal transactions, then both the parties become subject matter of being treated as violators of law and in that background, if some assault is made then it is not independent of the provocation available with the accused , wherein spouse of accused Bheru was living with deceased Bheru , who already had a wife. Polygamy is not the order in the republic and in that view, if an assault has been made by the accused ,then naturally it is on the provocation and not a cold blooded assault.

Further the manner of assault has been changed by the

prosecution witnesses at their will. As has been stated by the prosecution witness Kesar that is not that with the beating of Gottu that the incident started, the incident started in some other fashion. How did the incident start, has not been correctly deposed by the prosecution witnesses. Thus, the prosecution has withheld the correct version of origin of the fight and beginning of the story .

The learned counsel for the appellant then stated that the incident having taken place in the manner, which is not truthful as deposed by the prosecution , it was not safe to convict the accused appellants under section 302/34 IPC for murder. The case of the accused would fall in exception 1 of Section 300 IPC and, therefore, the accused should be given a lenient treatment . They have remained behind the bars for a period of more than three years and their conviction under section 302 IPC be converted into one under section 304-II IPC and they be made to pay fine to the next of kin of the deceased.

Per contra, the learned Public Prosecutor submitted that it was high handedness of the accused that they took law in their hands. If the lady was not desirous of living with accused Bheru and she on her volition chose Bheru deceased to be her living in

partner, then no exception can be taken out to the accused persons for heir conduct as alleged. Legally two marriages are not possible but yet if a lady chooses to live in the fold of another man and her first wife does not object to it, then the accused were not the persons to select the right ethical values for the deceased and that lady and on this pretext, the accused cannot be granted any lenient attitude. The trial court has convicted the accused accordingly and that deserves to be maintained.

We have heard the learned counsel for the parties and have given our thoughtful consideration to the material available on record.

Admittedly, the deceased Bheru was affording the luxury of polygamy marital relationship. PW/18 Kesar was his legally wedded wife admittedly on record and then if Pyari chose to be the living- in partner of accused Bheru then of course it is certain that a legally wedded husband would get enraged . He may some day react in a violent fashion.

The incident has occurred as back as in the year 1983. The accused has been enlarged on bail after having remained behind

the bars for more than three years. The incident having occurred due to the provocation of accused Bheru by permitting Pyari to live with him , deserting accused Pyari having taken into the fold of deceased Bheru, it certainly gives a cause of enraged feelings to the accused Bheru. If he wanted to rescue his legally wedded wife then, may be he was not permitted to take law in his own hands, but then his case cannot be one which can be said to be an incident which occurred without there being a provocation. In that background, we deem it proper to convert the conviction of the accused appellants from under section 302 IPC to under section 304-II IPC. The conviction under other sections is maintained. The period already undergone is considered sufficient to meet the ends of justice. As offered, the accused are directed to pay compensation to the tune of Rs.1,00,000/- to the next of kin of the deceased.

In the result, the appeal is partly allowed. The conviction of the accused appellants under section 302 IPC, is set aside , instead they are convicted under section 304-II IPC. Conviction under other sections of IPC is also maintained. Sentences are however altered. The period of sentence already undergone is considered sufficient to meet the ends of justice. The accused are directed to pay Rs.1,00,000/-as compensation to the next

of kin of the deceased .

The accused have deposited Rs,1,00,000/- (Rupees One lac only) with the Dy. Registrar (Judl.), for disbursement to next of kin of the deceased, the same be forwarded to the concerned court for disbursement.

(MUNISHWAR NATH BHANDARI), J. **(BHAGWATI PRASAD), J.**

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